Supreme Court, U.S.
FILED

No. 04-1391

APR 14 2005
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# In The Supreme Court of the United States

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## HOMI N. AMIRMOKRI,

*Petitioner,*

v.

## SAMUEL W. BODMAN, Secretary, U.S. Department of Energy,

*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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# PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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## QUESTIONS PRESENTED

1. Whether the Fourth Circuit Court of Appeals erred – contrary to decisions of this Court, and several other Circuits – in failing to find that the District Court Judge issued confusing jury instructions during a trial.

2. Whether the Fourth Circuit Court of Appeals erred – contrary to decisions of this Court, and several other Circuits – in failing to find that the District Court Judge improperly allowed untimely evidence to be introduced at trial.

3. Whether the Fourth Circuit Court of Appeals erred – contrary to decisions of this Court, and several other Circuits – in failing to find that the District Court Judge improperly denied an expert/treating physician the opportunity to testify as a hybrid witness.

4. Whether the Fourth Circuit Court of Appeals erred – contrary to decisions of this Court, and several other Circuits – in failing to find that the District Court Judge failed to properly question a juror.

## PARTIES AND CORPORATE DISCLOSURE

Pursuant to this Court's Rule 14, a complete list of Petitioners follows:

1. The full name of every party represented.

I am filing this pro se.

2. The name of the real parties in interest represented by me are:

Not Applicable.

3. All parent companies and any public held companies that own 10 percent or more of the stock of the party represented by me is:

Not Applicable.

4. The names of all the law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial or agency or are expected to appear in this court are:

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Homi N. Amirmokri respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

## OPINIONS BELOW

The decision of the Fourth Circuit Court of Appeals ("Fourth Circuit") is attached hereto. (App. 1a-3a).. The opinion of the trial court is attached hereto (App. 4a).

## JURISDICTION

The judgment below was entered on January 14, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides for procedural due process which in this case requires the Federal Courts to uniformly apply jury instructions when dealing with Constitutional Due Process Issues.

### U.S. CONST. amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or

property, without due process of law; nor shall private property be taken for public use, without just compensation.

## STATEMENT OF THE CASE

### I. Factual Background

1. The Plaintiff, Homi N. Amirmokri, was born in Iran and immigrated to the United States in 1974. The Defendant, the United States Department of Energy, hired Amirmokri in July 1991 to work in its Office of Nuclear Energy, Science, and Technology (NE) in Germantown, Maryland. Amirmokri has worked there since that date. Amirmokri has a bachelor of science in nuclear engineering and a professional engineering license. He had over ten (10) years experience in nuclear engineering and design before coming to DOE.

2. By May 1998, Amirmokri was qualified for a position as a program manager for a nuclear reactor by virtue of his education and experience before DOE, and seven years performing similar job functions for DOE.

3. In May 1998, Robert Lange, Amirmokri's first-line supervisor and Director of Nuclear Facilities Management, asked Amirmokri to take over Headquarters responsibility for facilities NE manages at Oak Ridge National Laboratories (ORNL) in Tennessee. NE is responsible for oversite of several ORNL facilities including the High Flux Isotope Reactor (HFIR) [*pronounced High-Fur]*. At that time, HFIR was one of two category 1 research reactors operated by DOE. The other research reactor was the Advance Test Reactor in Idaho (ATR). After May 1998, Amirmokri performed the same duties that the program manager of ATR performed. Amirmokri was still a GS-14. Lawrence Miller, the program manager for ATR, was a GS-15. William Magwood has been Amirmokri's second-line

supervisor, and the Director of NE, since June 1998. Close to the time Magwood was appointed, Amirmokri and several other foreign-born NE employees met with Magwood to complain that NE had a history of deliberately overlooking foreign-born employees in making promotions. Director Magwood has the authority to make all promotion decisions within NE including the power to create new salary grade 15 positions. NE has a practice of grooming employees for promotion and tailoring promotional opportunities to the skills and experiences of persons judged to be deserving of promotion.

4. Between the time Amirmokri started working as ORNL Headquarter Program Manager, May 1998, and the time Magwood selected him for promotion, Magwood approved more than a dozen promotions to Grade 15, the Senior Executive Service, and the Excepted Service. These promotions included promotion of at least five U.S.-born employees to grade 15 nuclear engineering positions. Each of the five (Lisa Herrera, Dan Funk, Robert Price, Kevin Shaw and John Wheeler) had worked less time than Amirmokri in the areas in which they were promoted.

5. In January 2000, Lange told Amirmokri to assemble his application materials for a promotion. In February 2000, NE announced a vacancy for a GS-15 Program Manager for the Fast-Flux Test Facility (FFTF), an inactive reactor. Lange told Amirmokri the promotion was not for him, but that he was next. Magwood selected Dan Funk, who was already working on FFTF. In May 2000, Lange told Amirmokri that the promotion appeared less likely. Amirmokri tried to tried to persuade management to conform the position description to match his duties as required by DOE procedures. On October 11, 2000, Amirmokri began the equal employment opportunity (EEO) complaint process.

6. On March 23, 2001, during the EEO investigation, Amirmokri learned he had been selected for promotion to a Salary Grade 15 position as HFIR program manager. The workload for the HFIR (and the other nuclear facilities) program manager has been heavy for a number of reasons. As a result, Amirmokri has worked 3600 hours of uncompensated overtime between May 1998 and December 2001. In contrast, the normal workweek for a nuclear engineer in NE, nearly all of whom are U.S.-born, is a little over 40 hours.

7. In September 2000, Amirmokri asked Lange to approve use of annual leave for vacation. Lange told Amirmokri that if he took time off, his duties would be given to others. DOE employees are permitted to carry 240 hours of leave from one year to the next. Any leave balance above 240 hours is lost unless the supervisor approves a carryover. Amirmokri asked Lange to authorize carryover of his leave balance to the next year. Lange refused. Amirmokri also wanted to carry unused leave in the calendar year 2001. Lange denied the request.

## II. Proceedings Below

1. On May 25-27, 2004, a jury trial was held in the District Court of Maryland.

2. On May 28, 2004, the District Court of Maryland entered an Order of Judgment against the Plaintiff.

3. On January 14, 2005, the Fourth Circuit Court of Appeals affirmed the decision of the District Court.

## REASONS FOR GRANTING THE WRIT

### I. Confusing Jury Instructions

Several times in the Judge's instructions to the jury, he used the terms and framework of a prima facie case. See Instruction 6, Page 574 of the Transcript (App. 21a-22a); See also Instruction 8, 9, and the discussion of relation. (App. 22a-23a) Several courts have held that giving instructions which include prima facie instructions can be confusing to a jury. The "order and allocation of proof" are not matters for which juries are responsible - and, as the First Circuit pointed out in a leading case decided six years after McDonnell Douglas, the McDonnell Douglas opinion "was not written as a prospective jury charge. . . ." Loeb v. Textron, Inc., 600 F.2d 1003, 1016 (1st Cir. 1979). Heavily freighted with technical legal language ("prima facie case," e.g.), the McDonnell Douglas opinion was written for an audience of judges and lawyers. To read [the opinion's] technical aspects to a jury, the Loeb court said, ". . . will add little to the juror's understanding of the case and, even worse, may lead jurors to abandon their own judgment and to seize upon poorly understood legalisms to decide the ultimate question of discrimination." Id. Cf. Kitchen v. Chippewa Valley Schools, 825 F.2d 1004, 1012 (6th Cir. 1987), where we quoted this passage from Loeb with approval.

Other courts of appeals have likewise followed Loeb's lead. See, e.g., Cabrera v. Jakabovitz, 24 F.3d 372, 380 (2d Cir. 1994) (bemoaning the fact that "lawyers are still prone to include in requested jury charges language that was written by appellate courts in the context of bench trials - language that is at best irrelevant, and at worst misleading to a jury"); Sharkev v. Lasmo (AUL LTD.), 214 F.3d 371, 374 (2d Cir. 2000) ("We agree that juries should not be charged on the McDonnell Douglas burdening-shifting framework"); Gordon v. New York City Bd. of Educ., 232 F.3d 111, 118 (2d

Cir. 2000) ("The jury. . . does not need to be lectured on the concepts that guide a judge in determining whether a case should go to the jury"); Mullen v. Princess Anne Volunteer Fire Co., Inc., 853 F.2d 1130, 1137 (4th Cir. 1988) (burden-shifting instructions "are beyond the function and expertise of the jury, which need never hear the term 'prima facie case'"); Walther v. Lone Star Gas Co., 952 F.2d 119, 127 (5th Cir. 1992) ("Instructing the jury on the elements of a prima facie case, presumptions, and the shifting burden of proof is unnecessary and confusing"); Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994) (trial judge acted correctly in declining "to walk the jury through the paradigm established by McDonnell Douglas"); Williams v. Valentec Kisco, Inc., 964 F.2d 723, 731 (8th Cir. 1992) (reiterating that "the McDonnell Douglas 'ritual is not well suited as a detailed instruction to the jury' . . ."); Costa v. Desert Palace, Inc., 299 F.3d 838, 855 (9th Cir. 2002) (en banc) ("it is not normally appropriate to introduce the McDonnell Douglas burden-shifting framework to the jury"), aff'd, 154 L. Ed. 2d 766, 537 U.S. 1099, 123 S. Ct. 816 (2003); Messina v. Kroblin Transportation Systems, Inc., 903 F.2d 1306, 1308 (10th Cir. 1990) ("The McDonnell Douglas inferences provide assistance to a judge as he addresses motions to dismiss, for summary judgment, and for directed verdict, but they are of little relevance to the jury"); Dudlev v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1322 (11th Cir. 1999) ("We stress that it is unnecessary and inappropriate to instruct the jury on the McDonnell Douglas analysis").

## II. Late Produced Evidence

The Defendant produced documents well after the close of Discovery which were allowed in as evidence at the Trial. The Defendant produced Stamos' notes late; See Page 213 of the Transcript (App. 20a-21a; App. 48a-56a). The Defendant should have been sanctioned for late production of important evidence. Discovery material, see Pages 86, 87,

132 and 204 of the Transcript (App. 10a-14a, 18a-19a; App. 48a-59a) was used at the Trial as well. The evidence was produced late, and the District Court should not have allowed it to be entered or used. The Defendant displayed a pattern of producing critical documents late to Plaintiff's prejudice (App. 36a-47a).

The government's tactic of not making adequate and timely disclosures and not supplementing discovery responses until at or just before trial was roundly condemned by Magistrate Judge Facciola in three separate opinions. Coles v. Perry, 217 F.R.D. 1 (2003). In his words:

> "Fed. R. Civ. P. 26(e) requires a party who had made an initial disclosure or responded to a request for discovery to supplement its disclosure or response if that party learns that in some material respect the information previously disclosed is incomplete. [Defendant's post-summary judgment] letters. .. were not in compliance. . . In reality, defendant's counsel was attempting to rescue the defendant from its failure to disclose the documents when it should have. . . To say that disclosure after the discovery deadline is harmless ignores that a central purpose of setting a discovery deadline is to move the case expeditiously forward from the end of discovery, through dispositive motions, to pre-trial and trial. I, therefore, . . . find that Defendant did not comply with its obligations as to the disclosure of the documents and witnesses and I must invoke the automatic sanction required by Fed. R. Civ. P. 37 (c) (1) of excluding the evidence unless defendant establishes that the failure to disclose the document or the witness was harmless." 217 F.R.D. at 5.

In Coles, Judge Facciola invoked Rule 37's automatic sanction of exclusion when the government attempted to

offer evidence at trial that was first produced in letters from its counsel well after discovery had closed. Id. He was eminently correct in doing so. E.g., Yeti By Molly Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1106 (9th Cir. 2001). The same outcome should have occurred here.

## III. Dr. Bahar not being able to testify as an expert

The Judge ruled that anything connected with what he did or saw would be okay, but that Dr. Bahar could not give expert opinions about what did or did not cause the stress because Defendant was not on notice so it is unfair. See Pages 161-165 of the Transcript (App. 14a-18a). The Local Rule 104.10 states:

> Actions and Witnesses Exempted From Provisions of Fed. R. Civ. P. 26(a)(2)(B). Unless otherwise ordered by the Court a party must provide the disclosures required by Fed. R. Civ. P.26(a)(2)(B) only as to experts retained or specially employed by a party to provide expert testimony. The disclosures need not be provided as to hybrid fact/expert witnesses such as treating physicians. The party must disclose the existence of any hybrid fact/expert witness pursuant to Fed. R. Civ. P.26(a)(2)(A), and an adverse party may obtain the opinions of such witnesses (to the extent appropriate) through interrogatories, document production requests, and depositions.

The District Court was in error and affected the outcome of the Trial.

## IV. Juror No. 143 being allowed to serve as a juror

Juror No. 143 worked as an administrative secretary for the chief judge at the Department of Energy. Page 14 of the Transcript (App. 5a-6a), the Judge said, "Okay. I guess this is a related question. I'm at, counsel, question 13. Have

you ever worked for a lawyer? That's paralegal or some other capacity where you'd have knowledge of law. I guess that's a related question."

Page 14 of the Transcript (App. 5a), "Prospective Juror: 143. Many years ago I was an administrative secretary for the chief judge at the Department of Energy."

Juror No. 143 was selected. See Page 43, of the Transcript. (App. 9a)

There were no follow up questions by the Judge, for Juror No. 143.

For other jurors there were follow up questions.

Page 38 of the Transcript (App. 8a-9a), "The Court: All right, ladies and gentlemen, are there any other reasons that you have not given us that would prevent you from sitting in fair and impartial judgment? Any other reasons, other things you can think of that would prevent you from sitting, if selected, during these three days for this trial? All right. We assume by your silence there's nothing else. Yes."

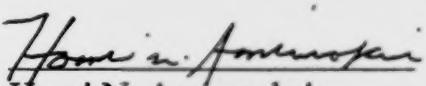
Page 32 of the Transcript (App. 7a), "The Court: All right. Would you be able to put aside your own personal experience with that and concentrate on the evidence in this case and my instructions and give a fair judgment?"

Failure to question Juror No. 143 regarding her feelings like other jurors were questioned, was error.

## CONCLUSION

The petition for Writ of Certiorari should be granted for the foregoing reasons.

Respectfully submitted,



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**UNPUBLISHED**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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**No. 04-1835**

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HOMI N. AMIRMOKRI,

Plaintiff - Appellant,

versus

SPENCER ABRAHAM, Secretary,
U.S. Department of Energy,

Defendant - Appellee.

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Appeal from the United States District Court for the District of Maryland, at Greenbelt. Alexander Williams, Jr., District Judge. (CA-02-3446-8-AW)

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Submitted: December 23, 2004 Decided: January 14, 2005

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Before LUTTIG and DUNCAN, Circuit Judges, and HAMILTON, Senior Circuit Judge.

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Affirmed by unpublished per curiam opinion.

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Homi N. Amirmokri, Appellant Pro Se. Tarra R. DeShields-Minnis, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellee.

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Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Homi N. Amirmokri appeals from the final judgment entered in favor of the defendant following a jury trial on his Title VII* claims of national origin discrimination and retaliation. Finding no error, we affirm.

On appeal, Amirmokri first argues that the district court issued an erroneous jury instruction at the close of trial. This court reviews a district court's decision of whether to give a jury instruction and the content of an instruction for abuse of discretion. See United States v. Abbas, 74 F.3d 506, 513 (4th Cir. 1996). When jury instructions are challenged on appeal, the issue is whether, taken as a whole, the instructions fairly stated the controlling law. United States v. Cobb, 905 F.2d 784, 788-89 (4th Cir. 1990). "Even if instructions are flawed, there can be no reversal unless the error seriously prejudiced the challenging party's case." S. Atl. Ltd. P'ship of Tenn. v. Riese, 284 F.3d 518, 530 (4th Cir. 2002). Guided by these principles, we have reviewed the jury instruction in its entirety and find no reversible error. See Mullen v. Princess Anne Volunteer Fire Co., Inc., 853 F.2d 1130, 1137 (4th Cir. 1988).

Amirmokri next argues that the district court erred by allowing into evidence documents that were produced by the defendant after the close of discovery and by refusing to admit expert testimony from his treating physician. This court affords substantial discretion to a district court in managing discovery and reviews discovery rulings only for abuse of that discretion. U.S. ex rel. Becker v. Westinghouse Savannah River Co., 305 F.3d 284, 290 (4th Cir. 2002), cert. denied, 538 U.S. 1012 (2003). Decisions regarding the admission of evidence are also reviewed for abuse of discretion. See United States v. Stitt, 250 F.3d 878, 888 (4th

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* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to 2000e-17 (2000).

Cir. 2001). Moreover, only if the district court's exclusion affected the substantial rights of the complaining party should its evidentiary ruling be overturned. See Mullen, 853 F.2d at 1135. We have reviewed Amirmokri's submission on these issues and find no abuse of discretion.

Finally, Amirmokri argues that the district court erred by impaneling a particular juror without sufficient questioning. District courts have "wide discretion" in conducting the jury selection process. See Person v. Miller, 854 F.2d 656, 665 (4th Cir. 1988). Having reviewed the transcript of voir dire in the instant case, we find no abuse of that discretion.

For the foregoing reasons, we affirm the judgment of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

**HOMI N. AMIRMOKRI**
**Plaintiff**

**v.** **Case No. AW-02-3446**

**SPENCER ABRAHAM**
**Defendant**

**[ENTERED: MAY 28, 2004]**

**ORDER OF JUDGMENT**

The jury having returned a verdict in favor of the Defendant against the Plaintiff, it is this 28th day of May, 2004,

**ORDERED,**

1. Judgment is entered in favor of Defendant against Plaintiff, with costs; and

2. Any and all prior rulings made by the Court disposing of any claims against any parties are incorporated by reference herein, and this Order shall be deemed to be a final judgment within the meaning of Fed. R. Civ. P. 58.

/s/ Alexander Williams, Jr.
ALEXANDER WILLIAMS, JR.
United States District Judge

U.S. District Court (Rev. 12/2000) - Order of Judgment (in favor of Defendant)

PROSPECTIVE JUROR: No. 27. I attended law school for one year.

THE COURT: All right.

PROSPECTIVE JUROR: I'm not an attorney.

THE COURT: All right. Okay. Anyone else?

Okay. I guess this is a related question. I'm at, counsel, question 13. Have you ever worked for a lawyer? That's paralegal or some other capacity where you'd have knowledge of law. I guess that's a related question.

PROSPECTIVE JUROR: 312.

THE COURT: 312.

PROSPECTIVE JUROR: I'm a claims adjustor for an insurance company. So I deal with a lot of litigated cases.

THE COURT: All right. Anyone else?

PROSPECTIVE JUROR: 237. I worked as a legal assistant for a lawyer but he was dealing with copyright issues.

THE COURT: Copyright, okay.

PROSPECTIVE JUROR: 143. Many years ago I was an administrative secretary for the chief judge at the Department of Energy.

THE COURT: Okay. All right. I think there's a related question about whether you've been employed with

that department, but we now know that. You have related that to us now. All right. Thank you.

All right. So let's ask that question now that we were

*** *** ***

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or state government, any dispute?

All right. No one.

We're just about at the end, ladies and gentlemen. I'm going to now ask a series of questions that I would like you to listen to all of these questions. There are about eight of them -- maybe seven, seven or eight. And after I have completed the seven or eight questions, then I'd ask that to the extent any of you are affected by these questions, I'd ask that you line up at the gate leading to the well of the court and come in. And the reason that these questions we want to take individually just with the lawyers here is that they are no one's business but yourselves really. You don't have to let anyone know. And the lawyers just want to take note of it when they make their selections to see whether they think there may be something in your background or experience that might interfere with you being fair and impartial in this case. So that's the only reason for it.

So, I'm going to ask these questions and, again, wait until I have finished all of them and then to the extent you are affected, you can come up and tell us your response and then we may ask you a couple of follow-up questions to make sure that you should be able to sit in this case.

Here are the questions: One, have you, a family member, or close friend ever been a party to a lawsuit

seeking damages for alleged violations of civil or constitutional

*** *** ***

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PROSPECTIVE JUROR: Reading about it, hearing about it.

MR. WACHTEL: There have not been any others that you have gotten?

PROSPECTIVE JUROR: No.

MR. WACHTEL: Nothing further. Thank you.

THE COURT: All right. Would you be able to put aside your own personal experience with that and concentrate on the evidence in this case and my instructions and give a fair judgment?

PROSPECTIVE JUROR: Yes, I believe I can.

THE COURT: All right. Okay. Thank you.

There do not seem to be any other persons who have lined up. I'm about at the end. There's just some general questions. Anything else or what have you. But I'm just about done. I don't know whether you all want to call any other jurors up and explore any other responses or anything. If you do, this is your chance, because I'm about ready to wrap it up.

MR. WACHTEL: If we could ask the person who was a claims adjustor what type of claims he has experience with.

THE COURT: All right. What number is that?

MR. WACHTEL: 312.

THE COURT: Okay. Do you all have any?

MS. DESHIELDS: No, Your Honor.

THE COURT: Okay. There's a request to bring up 312 and find out a little more about his claims adjustments.

*** *** ***

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THE COURT: Yes, from the front. And what happens is they alternate these jurors. The next time they come in, they bring in the ones from the rear first. So they alternate.

MS. DESHIELDS: I guess the clerk will explain whether we start from the top or the bottom?

THE COURT: Yes, the clerk will explain that. All right. Thank you.

MR. WACHTEL: Thank you, Your Honor.

(In open court:)

THE COURT: All right, ladies and gentlemen, are there any other reasons that you have not given us that would prevent you from sitting in fair and impartial judgment? Any other reasons, other things you can think of that would prevent you from sitting, if selected, during these three days for this trial?

All right. We assume by your silence there's nothing else. Yes.

MS. NICHOLS: Excuse me, Your Honor. Question 28.

THE COURT: All right. Let's look at 28. All right. Let's see if we can get that one, 28.

All right. Yes, that's a good question. Thank you. I skipped that one.

All right. Let's get prior jury service in civil cases. That is interesting to know, yes. We would like to find out whether there are any members of this panel who have ever

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MR. WACHTEL: I think my opening is about 15.

THE COURT: Government the same?

MS. DESHIELDS: Probably 15 to 20.

THE COURT: All right. We can do it before lunch then.

(Jury panel present.)

THE DEPUTY CLERK: Members of the jury, as I call your number, will you please take a seat in the jury box.

Juror No. 1 will be Juror No. 241, first row, all the way over. Juror No. 2, 237; Juror No. 3, 210; Juror No. 4, 168; Juror No. 5, 143; Juror No. 6, 129; Juror No. 7, 124.

THE COURT: All right. Is that seven?

THE DEPUTY CLERK: Yes, sir.

THE COURT: All right. We would ask the litigants whether they are satisfied with this panel of seven?

MR. WACHTEL: Plaintiff is satisfied, Your Honor.

MS. DESHIELDS: Defense is satisfied, Your Honor.

THE COURT: All right. So, ladies and gentlemen, we now have seven. I thank you for your time and consideration and you may return to the second floor for any further instructions that they have for you. Thank you for your patience.

(Panel excused.)

THE COURT: Any preliminary matters before I swear this jury in?

MR. WACHTEL: No, Your Honor.

MS. NICHOLS: No, Your Honor.

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wrote, you give your reasons why Mr. Amirmokri ought to be promoted the next year, correct?

A Yes.

Q And can you read that section aloud, the Homi Amirmokri section.

A Yes. Under 2000 planned promotions, I've got Homi Amirmokri in bold and I said, "Homi is functioning as the HFIR program manager detailed to a GS-15 position. He is working well with the field."

Q So there's no mention there that Mr. Amirmokri isn't really as independent as a GS-15 ought to be, correct?

A There is no mention here again, but that was one of the reasons why I did not put the promotion in for the 1999 time frame.

Q You were free to write what you wanted here, correct?

A That is correct.

Q In fact, if you wanted to write about how you expected Mr. Amirmokri to develop over the next couple of years, you could have done that, right?

A I think I was free to write whatever I would have liked to have put in here.

Q What happened to the list after the meeting? Did you see it again?

A No, I never saw it again until it was discovered for this trial.

Q And how long ago was it discovered?

A I believe Peggy Coates found it just a couple of weeks ago.

Q At that meeting no one said anything negative about Mr. Amirmokri, did they?

A No, they did not.

Q For example, nobody said he's really not working that independently, correct?

A No, but -- no, that's correct. There was not anything said really either way.

Q You listed three people that you suggested ought to be promoted to GS-15 in 1999, correct?

A Let me just check, if I may. That's correct, yes.

Q And two of them, Mr. Warren and Mr. Shaw, were going to be moving to a new office, correct?

A The Office of Uranium, that's correct.

Q It's full name is Office of Depleted Uranium Hexafluoride?

A Yes.

Q But you just refer to it as the Office of Uranium?

A That's correct.

Q So the Office of Uranium was newly created?

A Yes. There was a time when it was together with the Office of Facilities because it was one entity, but then it was decided that it was such a different function that it would be broken off altogether.

Q How long had Mr. Shaw been doing the substantive work for

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effectively. So I got a comprehensive list.

Q And was that a written list?

A It was a written list that was compiled that was given to my personnel manager and then just sort of brought together as a package and shown to me.

Q Okay. There should be a document on the desk in front of you, Defendant's Exhibit 8. Is that the list?

A Exhibit?

Q I believe it's Defendant's Exhibit 8. I'll show you what the front of it looks like.

A Would that be D8?

Q D8, D for defendant. Do you have that?

A Yes, I do.

Q Is that the list you're speaking of?

A Yes, this is the list.

Q Okay. So that list, you'll notice that the second page is an e-mail dated March '99, March 29, '99?

A Yes.

Q The list was put together what, about nine months after you started the job as director of Office of Nuclear Energy?

A Yeah, that's about right.

Q What did you do with the list with once you got it?

A Nothing specific. I was trying to get a sense as to what the situation was. You know, I had heard anecdotally that there were many staff that were not given opportunities because

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the testimony of the treating physician. The fear is that he's going to be testifying as an expert and not doing treating. What is your position on that?

MR. WACHTEL: I'm struggling with my phrasing. He is going to testify as a treating. However, I believe that the federal rules of civil procedure allow treating physicians to give opinions that are very much like what an expert witness may give, and the difference isn't how qualified he is or how strong the opinion is. The difference is that he formed the opinion in his practice, and as long as he's formed the opinion because he's Mr. Amirmokri's doctor in his practice and he has been for a long time, then it's a treating physician's opinion and we're not obligated to give the disclosures in the second part of Rule 26(a)(2)(B). We're only required to do 26(a)(2)(A), his identity, which we did. In fact, we disclosed his identity and he turned over his medical records.

By the way, this is covered in a case cited by the defendant, Sullivan v. Glock, 175 FRD 497. It's written by Magistrate Grimm and what he says is that courts have gone in two different directions, but the view that he thinks is correct is from a case called Shaferton, 172 FRD 415, and what that says is that, "Treating physicians commonly

consider the cause of any medical condition presented in a patient, the diagnosis, the prognosis, the extent of disability, if any, caused by conditions or injuries. Opinions such as these matters that encompass the ordinary care of a patient do not subject the treating physician to the report requirement of Rule 26(a)(2)(B).

THE COURT: Didn't we cover this in the pretrial conference?

MR. WACHTEL: I thought that we did. I don't think we talked for very long. You asked me if it was a treating and I said yes, he's the treating.

THE COURT: I was under the impression that he wouldn't be giving any expert opinions. Now, of course, anything that's so connected with what he had to do or what he saw, that's one thing, but I don't think it's fair to the government if you're going to have him testify to a bunch of expert opinions or a lot of expert opinions that they didn't have time to assess, to meet, to decide whether they wanted an expert and what have you.

So, I think the easiest thing to do is to tell me what, if anything, by way of opinion he's going to testify. You may not know at this point. You may want to think about that and tell me in the morning what you think he's going to testify to that is in the area of opinions, because I'd like him just to stick to his treatment.

MR. WACHTEL: Well, I think I can address that, Your Honor. I think he's going to testify that he diagnosed Mr. Amirmokri with stress conditions. In fact, he diagnosed those even before some of the events in this case. He'll testify that he prescribed medication, and the medication itself is an opinion. It's an opinion that this person needs this drug because he has this problem. He's going to testify

that Mr. Amirmokri talked to him and that the concerns that were stress -- the things that were causing stress during this period were work, the work relationships, lack of promotions. And that comes in -- it comes in under the exception to the hearsay rule for statements to a treating physician, the fact that he said that. Dr. Bahar's opinion is that those statements indicate that work was exacerbating his condition, and that's an opinion that Dr. Bahar holds and we'd like him to be able to testify to that.

THE COURT: So, essentially I just heard one thing. He's going to testify that based on those complaints, he believed that it's work-driven. Is that what you're saying?

MR. WACHTEL: Yes. He made the distinction with me that it's work-exacerbated, but, yes, I think we're on the same page, yes.

THE COURT: What does the government have to say?

MS. NICHOLS: Your Honor, this is nothing more than a -- whatever term you want -- sandbag, back door effort to introduce expert testimony by an expert who has never been identified and never been deposed because he was never identified as an expert witness.

Your Honor, I would ask the Court -- we are not objecting to the medical records coming in and Dr. Bahar wrote in the medical records --

THE COURT: His diagnosis?

MS. NICHOLS: -- things that Mr. Amirmokri said to him. We're not objecting to any of those things. We're not objecting to his diagnosis and what he wrote at the time.

THE COURT: Complaints that he made?

MS. NICHOLS: We have no objection to that. What we are objecting to is the letter and the statements contained or similar statements contained in a letter that were sent by Dr. Bahar to Mr. Wachtel on April 18 and was produced to us on April 24, and what he says -- obviously Mr. Amirmokri, it appears, gave Dr. Bahar correspondence from Mr. Wachtel and perhaps stating some of the inconsistencies or various reasons noted for stress in the medical records where Dr. Bahar notes "stress and anxiety related to either the divorce" -- Mr. Amirmokri is divorced -- "or the lawsuit itself." And Dr. Bahar writes that the divorce ended November 19. Apparently the Berlin Wall was created. There's no further stress related to the divorce and all the anxiety and depression were related to stress caused by the problems at work. That is a causation argument by any other name. And he's also stating here the divorce played absolutely no role in his illness --

THE COURT: Yes, I agree.

MS. NICHOLS: -- after November '98.

THE COURT: I agree. I think he's crossed the line. I think he's crossed the line, Mr. Wachtel. I think he's crossed the line. I think he needs to stick to what complaints were made to him, what he prescribed, what he found. But I don't think he should be getting into these opinions. It was given to the government late. It's just not fair. Your client can testify as to what was going on in his mind and why he sought treatment and the jury can hear that, but I don't think it's necessary to have this doctor give an opinion as to the nexus and the link between what was happening at work and his ultimate opinion as to what drove it. I think he's crossed the line and I don't think it's fair to the government.

MR. WACHTEL: Thank you, Your Honor.

THE COURT: All right. So, I'm going to go ahead and grant the motion in limine, madam clerk, on that.

MS. NICHOLS: Your Honor, just very briefly, this is kind of related to the motion in limine. There is one letter and it appears twice in the medical records. It's at page Bates No. 37 of Plaintiff's Exhibit 8 and it appears later on in the medical records. May I approach, Your Honor?

THE COURT: All right.

MS. NICHOLS: It's sort of in a similar vein.

THE COURT: All right.

MS. NICHOLS: I think, Your Honor, I attached it to the motion.

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THE WITNESS: Thank you.

THE COURT: All right. The next witness, please.

MR. WACHTEL: The plaintiff calls John Stamos.

THE COURT: All right.

JOHN STAMOS, PLAINTIFF'S WITNESS, SWORN

THE DEPUTY CLERK: Sir, could you please state your name for the record and spell your last name, please.

THE WITNESS: It's John Stamos, spelled S-T-A-M-O-S.

DIRECT EXAMINATION

BY MR. WACHTEL:

Q Good morning, Mr. Stamos.

A Good morning.

Q David Wachtel representing Homi Amirmokri,

A Good morning.

Q Mr. Stamos, what do you do for a living?

A I work at the Department of Energy as a nuclear engineer.

Q What part of the Department of Energy are you affiliated with?

A The Office of Nuclear Energy, Science and Technology.

Q How long have you been with that office?

A I've been there about 13 years.

Q What did you do for a living before you joined the Office of Nuclear Energy?

A Immediately before that I worked at Edison Electric Institute.

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A Yes.

Q And who was that?

A That was Don Freeburn.

Q And what concern did Mr. Freeburn raise?

A He wanted to come by and discuss the fact that Homi had given a speech or presentation and wanted to know -- wanted to know what management had done to follow up on that speech, and then he wanted to make sure he relayed to us how management should be handling it.

Q Did you take notes of that conversation?

A Yes, I did.

Q You recently found those notes?

A I guess. I don't know what you mean "recently."

Q Well, I received a set of notes within the past two weeks.

A Okay.

Q Were they from you? I mean, I received them through counsel, but --

A They probably were, I believe.

Q You provided them to counsel --

A Yes.

Q – recently?

A I did provide copies probably about two weeks ago, yes.

Q So you made notes concerning the conversations with Mr. Freeburn as they were happening?

A I probably made some notes. What I typically do is I jotted

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job or promotion, whatever you think the facts suggest. That's the second element. Third, that he was qualified for the job. And, four, that he was rejected for the position under circumstances giving rise to an inference of unlawful discrimination. So, the last three elements of this claim one are the ones that really are in dispute.

Instruction 5. To meet his initial burden, the plaintiff must prove that he applied for or sought the job or promotion in question. To show that he applied for or sought the job or promotion, plaintiff must show that he followed the procedures and fulfilled the requirements that the employer generally required applicants to follow.

Instruction 6. Again, to meet the prima facie case or, as some say, prima facie, to meet his initial burden, the plaintiff must prove that, again, he was qualified for the position sought or applied for and to show that he was qualified, plaintiff must show that he possessed the skills announced by the defendant as requirements for the job or promotion in question. You should consider evidence

concerning the education, training or experience necessary to perform the job or promotion. Plaintiff is not required to prove his qualifications were superior relatively to other employees in like positions. The plaintiff must prove, however, that he was at least as well qualified for the position as the person promoted instead of him.

Instruction 7. To meet his initial burden, the plaintiff must prove that he was not offered the position by the defendant.

8. To meet his initial burden, the plaintiff must prove that he was not promoted under circumstances giving rise to an inference of discrimination.

If you determine that the plaintiff has made out a prima facie case of national origin discrimination, the burden then shifts to the defendant either to disprove an element of the plaintiff's case or to articulate a legitimate nondiscriminatory reason for his actions.

We're getting now to instruction 10, but let me just stop for a minute. On this first claim, ladies and gentlemen, just so you have a feel for what we're talking about, the first part of the claim in this case is made up through the proving first of a prime facie case or prima facie case, and those are the four elements I've just discussed that the plaintiff has to do. If you find that plaintiff has first established that part of the case or the claim, a prima facie claim, then the burden shifts to the defendant to then articulate some reasons why they made the decision that they made, and once they have done that, then the plaintiff must come back and show that those reasons are false or they're not true, and you then follow my remaining instructions. Ultimately at the end of the day you have to show that there was intentional discrimination based on national origin and so forth. But I

just wanted to stop right there so you see where this process is going. It's clearly set forth here.

Then instruction 10. Once the employer articulates a legitimate, nondiscriminatory reason for its actions, the burden shifts back to the plaintiff to prove that the legitimate nondiscriminatory reasons advanced are false and a pretext for intentional discrimination based on national origin and retaliation. The plaintiff bears the burden to establish by a preponderance of the evidence that the articulated reasons given by the Department of Energy are false and are a pretext for intentional discrimination. If you find that the plaintiffs have failed to prove that the Department of Energy's reasons were not false or that the reasons were not a pretext for intentional discrimination, if you find the plaintiff hasn't proven that, then your verdict must be for the defendant.

A pretextual reason could be a sham reason, a reason that is false or a reason that is true but not the real reason. While the jury's rejection of the defendant's legitimate, nondiscriminatory reason for its action does not compel a judgment for the plaintiff in appropriate circumstances -- for the plaintiff -- let me start that over again.

While the jury's rejection of the defendant's legitimate, nondiscriminatory reasons advanced for its action does not compel judgment for the plaintiff, in appropriate circumstances a jury can reasonably infer from the falsity of explanation that the employer is hiding the truth in order to cover up intentional discrimination.

The plaintiff's prima facie case combined with sufficient evidence to find that the employer's asserted justification is false may permit the jury to conclude that the defendant unlawfully discriminated. The fact that you might think that the employer misjudged the qualifications

of the applicant or applicants does not and of itself expose the defendants to Title VII liability, although this may be probative of whether the employer's reasons are pretext for discrimination.

In addition to proving that the defendant's proffered reasons are a pretext for discrimination, the plaintiff must prove that the real reason for the decision was discrimination. The plaintiff must also prove that the real reason for the discrimination was discrimination on the basis of national origin.

Now, let's go to the retaliation claim. That's the second claim in the prima facie case here. In this case the plaintiff has alleged that the Department of Energy retaliated against him by not promoting him, denying him permission to carry over into the next year in excess of that leave, and requiring him to work uncompensated overtime because he engaged in EEOC activity. And so, in order to establish a prima facie case of retaliation, here are the elements that the plaintiff must prove beyond -- by a preponderance of the evidence. I almost got caught up in criminal cases. By a preponderance of the evidence. One, that the plaintiff engaged in protected activity. That is, he filed an EEOC complaint or complained to a supervisor about an employment decision. That's really -- it's your call, but that's really not in dispute here that it was filed, an EEOC complaint. But the second two elements are disputed and you have to resolve these. The second element is that the defendant took an adverse employment action against the plaintiff. And then, third, that there is a causal connection existing between the protected activity and the adverse action.

So what are we saying here? You should first consider whether the plaintiff has established these elements of a prima facie case by a preponderance of the evidence. In

reviewing the evidence, you are instructed that mere knowledge on the part of an employer that an employee has filed a discrimination charge is not sufficient evidence to counter substantial evidence of legitimate reasons for taking such actions against the employee. If you find from your consideration of the evidence that the plaintiff has failed to establish all or any one of the elements of the prima facie case, then your verdict must be for the defendant.

Now, let me explain a little about the second and third elements of the retaliation claim. The process in this retaliation claim, they work the same way that they worked in the first claim. There's first a burden on the plaintiff to establish a prima facie case or prima facie case. They've got to establish that. I've given you the three elements. And once they have then established that, then the burden again is going to shift to the defendants to advance reasons for the actions, and then ultimately the burden is on the plaintiff to come back. If you believe that the government or defendant has established reasons for their actions, then you come back and you articulate -- you come back and prove -- the plaintiff comes back and proves that they were false.

All right. So let's go a little further. You should first consider whether the plaintiff has established the elements of a prima facie case by a preponderance of the evidence. In reviewing the evidence, you are instructed that mere knowledge -- I've already talked about that.

Let me explain the second and third elements. The adverse employment action. I'm in instruction 12 now. I've already talked about 11. The employment retaliation law requires, as an absolute precondition to the suit on any basis, that some adverse employment action has occurred. The term "adverse employment action" is a term of art. "Adverse employment action" does not include each and every action but only those actions that result in an adverse

or negative effect on the terms, conditions, or benefit of employment. It is the burden of the plaintiff here to establish by a preponderance of the evidence that the matter complained of -- here, the lack of promotion to a GS-15, or the denial of permission to carry over leave in excess of that which is permitted to carry over, and him being allegedly required to work uncompensated overtime -- you have the burden -- the plaintiff has the burden and you must be satisfied that plaintiff has established the burden by a preponderance of the evidence that the adverse employment action was there.

The final element for retaliation is instruction 13 and that's the causal connection. Here Mr. Amirmokri has the burden to establish by a preponderance of the evidence that there is a causal connection between the alleged act of retaliation -- here, the lack of promotion or the denial of permission to carry the leave and required to work this overtime, excessive overtime without compensation -- that there's a connection between the act of retaliation I've just explained and his engaging in protected EEOC activity.

While causation depends largely on the particular facts and circumstances of this case, factors pertinent to the causation element may include temporal proximity between the two events, the longer the time between the protected activity and the alleged adverse action, the less likely there is to be a causal connection, or intervening pattern of retaliatory conduct, innocent reasons by the employer for adverse action, and differential treatment of other employees. These are the kind of factors that you take into consideration.

MR. WACHTEL: I believe it's inconsistent reasons. You said "innocent."

THE COURT: Thank you, sir.

Inconsistent. Thank you. Inconsistent reasons by the employer for adverse action and differential treatment of other employees. If a prima facie case is established, the burden then shifts and the defendant must articulate a legitimate, nondiscriminatory reason for the adverse action. Once the defendant has dispelled the inference of retaliation by establishing a legitimate, nondiscriminatory reason, the plaintiff may sill prevail if the plaintiff demonstrates that the articulated reason was a mere pretext for discrimination.

Let me talk a little more about the burden shifting. Again, if a prima facie case is established, the burden of proof again shifts to the defendant and the defendant must articulate a legitimate, nondiscriminatory reason for the adverse action.

Now, the defendant bears the burden of articulating or producing any proper, nondiscriminatory or nonretaliatory reason or reasons for the adverse employment action taken by defendant against plaintiff. The defendant does not have to persuade you by a preponderance of the evidence that its articulated reasons were the true reasons for its decision but only has the burden of producing a nondiscriminatory and nonretaliatory reason.

Once the defendant has dispelled the inference of national origin discrimination and retaliation by establishing a legitimate, nondiscriminatory reason, plaintiff may still prevail if the plaintiff demonstrates that the articulated reason was a mere pretext for discrimination. Plaintiff bears the burden to establish by a preponderance of the evidence that the articulated reasons that the Department of Energy advanced are false and that he has been the victim of intentional discrimination.

Plaintiff must show that the employer intentionally discriminated against him on the basis of his national origin and retaliated against him. National origin discrimination and retaliation are intentional if they are done voluntarily, deliberately and willfully and not by accident, inadvertence or other innocent reason.

Plaintiff, however, is not required to prove direct evidence of national origin discrimination and retaliation. Intentional discrimination and retaliation may be inferred from the existence of other facts, such as from circumstances or indirect evidence. You may consider statements made, acts done or omitted, and all facts and circumstances which show whether or not the defendant acted intentionally to discriminate against the plaintiff because of his national origin and to retaliate for plaintiff's earlier filing of an EEOC complaint.

To prove the intentional discrimination and retaliation allegations, plaintiff must demonstrate more than his own subjective beliefs, opinions or feelings that the Department of Energy acted with discriminatory and retaliatory motives. He must present evidence, either direct or circumstantial, which show the existence of intentional discrimination and retaliation.

I'll give you instruction 16, which is something about management decisions. You may not find for the plaintiff merely because you feel the Department of Energy made a poor or unwise decision or decisions in plaintiff's case or that another person may have made more significant -- made different decisions. Title VII does not require that employment decisions of the defendant be impeccable or even the best or logical. The defendant need not show that it conducted its business in an optimum manner. Title VII only prohibits employment decisions made by an employer based on impermissible factors such as national origin or

prior participation in the EEOC process. That should be EEOC. That's a typo.

In order to recover, a plaintiff must demonstrate that intentional national discrimination or retaliation was the cause for the personnel action instituted against him. Even a showing of an unwise or unfair management decision does not entitle plaintiff to recover. The law does not expose an employer to liability merely because the employer may have misjudged an employee's job performance or made personnel decisions that were unwise. It is not your function in this case to second-guess the wisdom of any employment action affecting the plaintiff but merely to determine whether intentional discrimination based on national origin or retaliation was a motivating factor for the defendant's decisions or decision to not promote the plaintiff to a GS-15 position and to deny him permission to carry over leave in excess of that which is permissible to carry over and allegedly requiring the plaintiff to work uncompensated overtime.

Thus, even if you personally disagree with the actions that were taken, so long as intentional discrimination or retaliation was not a motivating factor for the actions, then you must return a verdict in the defendant's favor.

Now, you will have looked at these two claims and there's a verdict sheet that you'll be following and the verdict sheet is pretty self-explanatory. It basically says do you find that the plaintiff has established claim one by a preponderance of the evidence based on my instructions, and you would say yes or no to either of the claims, and if you find that there has been discrimination and it's been proven under the law by the plaintiff, then you would move to consider damages. And that's the same thing with retaliation. If you find no discrimination, then you don't

move to any question of damages. So, I'm giving you a recovery under the claim in the event that you reach that decision.

It is the duty of the Court to instruct you as to the measure of damages. By instructing you on damages, the Court does not mean to suggest for which party your verdict should be rendered. If you find that the plaintiff has established by a preponderance of the evidence that the Department of Energy intentionally discriminated against him because of his national origin or because of a prior complaint of discrimination filed, then you may determine an amount of money that is fair compensation for plaintiff's damages. You may award compensatory damages only for injuries that plaintiff proves to you by a preponderance of the evidence that were caused by the Department of Energy's alleged wrongful conduct. The damages that you award must be fair compensation, no more, no less. You may award compensatory damages based on the evidence introduced at trial for emotional pain and suffering, inconvenience, mental anguish. No evidence of monetary value of such intangible things as pain and suffering has been or need be introduced into evidence.

There is no exact standard for fixing compensation. Any award you make must be fair in light of the evidence presented at trial.

In determining the amount of any damages that you decide to award, you should be guided by dispassionate common sense. You must use your sound discretion in fixing an award of damages, drawing reasonable inferences from the facts here in evidence.

You may not award damages based on any sympathy, any speculation or any guesswork. On the other hand, it is not required that the plaintiff prove the amount of

his losses with mathematical precision but only with as much definiteness and accuracy as circumstances permit.

Conduct by the United States Department of Energy that does no harm does not entitle plaintiff to damages. By the same token, harm to the plaintiff which is not the result of any unlawful conduct by the United States Department of Energy does not entitle plaintiff to damages.

The burden of proving damages rests with the plaintiff in this case. If you decide to award damages, you must not award more than those damages that are adequate to compensate the plaintiff. You must not include any additional amount for the purpose of punishing the defendant or setting an example. Punitive damages cannot be awarded against the Department of Energy.

Again, in awarding damages you may not award plaintiff any damages for lost earnings. Sometimes they call that back pay. Any back pay, front pay, all of that are legal issues to be decided by the Court later depending on what your verdict is or is not. You may not include any amount in your damages for any interest or any attorney fees or other expenses. That's not part of the compensation here.

Finally, as I said before, you shall not and cannot include damages that are speculative, only possible, or based on guesswork.

So, ladies and gentlemen, those are the instructions. I'll get you copies of that. I made a couple of typos I put in there.

And I now reach the third and final part of the instructions. They only take a couple of minutes. That's just the mechanics of your deliberations.

In my courtroom -- other judges do it differently, but in my courtroom I always select the foreperson and it's always the first person called. So, whoever sits in seat No. 1, and that's Juror No. 1 and you are the foreperson. And the foreperson will preside over the deliberations and be the spokesperson here in court. And when you have reached a unanimous verdict -- that's all seven of you -- please notify the bailiff. You will then return to the courtroom and Ms. Harriet Spence -- I'm not going to call her Grevera any more. She's now married -- Harriet Grevera Spence after taking roll call will take your verdicts. She will ask, "Have you reached a verdict?" You will say, "We have." She will say, "Who will speak for you?" And all seven of you will say, "Our foreperson." The clerk then will ask the foreperson to give your verdict as to the liability of the defendants in this case.

I have prepared the verdict sheet. We don't need to go over it any more. I think it's pretty self-explanatory. You have four questions. The first question deals with the claim on discrimination because of national origin and the other allegations, and for plaintiff or for defendant. If it's for plaintiff, you move to the second question and deal with compensation. If it's no or if it's for the defendant or you feel plaintiff didn't establish his burden on claim one, then you skip two and go to the second claim, which is retaliation, and the same two choices you'll have, plaintiff did or did not prove that. If they proved it, you move to the fourth question on damages. And then it will be signed and dated by the foreperson and you'll be ready to deliver your verdict.

If it becomes necessary during your deliberations to communicate with me, you may send a note by the bailiff signed by your foreperson or by any one or more members of the jury. No member of the jury should ever attempt to

communicate with me by any means other than a signed writing and I will not communicate with any member of the jury on any subject touching the merits of this case other than in writing or orally here in open court.

You will note from the oath about to be taken by the bailiff/marshal here that he as well as all other persons are forbidden to communicate in any way with any members of the jury on any subject touching the merits of this case.

Bear in mind also that you are never to reveal to any person -- not even to the Court -- how you stand numerically or otherwise on the issues to be decided until after you have reached a unanimous verdict. Your verdict must represent the considered judgment of each juror. In order to return a verdict, it's necessary that each juror agree thereto. Your verdict, ladies and gentlemen, must be unanimous. It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment.

Each of you must decide the case for yourself but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous but do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Remember at all times you are not partisans. You are judges. You are judges of the facts. Your sole interest is to seek truth, fairness from the evidence in the case.

All right. So that would be the instructions, ladies and gentlemen. And I'm going to call the marshal up front. And, again, ladies and gentlemen, the reason you're seven is that in a civil case there can be anywhere from six to 12 jurors. In criminal cases we always require 12, but in a civil case it's six to 12. The parties selected seven. So this is why you are seven.

All right. Let's swear in this marshal.

THE DEPUTY CLERK: Please raise your right hand.

(Court security officer duly sworn by the deputy clerk.)

THE DEPUTY CLERK: Please state your name for the record.

PROSPECTIVE JUROR: George F. Ward, W-A-R-D.

THE DEPUTY CLERK: Thank you.

THE COURT: All right. You may take the jurors back there. And we'll send in the evidence and I'm going to get these instructions sent back to you. I'm going to switch up page 10.

(Jury retired from the courtroom to commence deliberations at 10 o'clock a.m.)

THE COURT: All right. This ends this. I appreciate the time and the effort of all the sides and litigants here. This was a well presented case from both sides. I didn't want to push you as much as I had to, but we just have a tight schedule here and I couldn't give you but three or four days at best. I start another trial on Monday. In fact, I'm in trial back to back. I have another trial starting Tuesday and then

after that I've got to push them to finish in a week and I've got a four- or five-week criminal case that starts, a multi

*** *** ***

**U.S. Department of Justice**

*United States Attorney*
*District of Maryland*
*Northern Division*

---

*Thomas M. DiBiagio*
*United States Attorney*

*Tarra DeShields*
*Assistant United States Attorney*
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*6625 United States Courthouse*
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May 6, 2004

David M. Wachtel
Rose & Rose
1320 19th Street, N.W.
Suite 601
Washington, D.C. 20036

Re: *Amirmokri v. Abraham,*
Civ. No. AW-02-3446

Dear Mr. Wachtel:

Respecting the above-captioned case, and in compliance with Rule 26(e)'s continuing obligation to supplement discovery once discovery-related material is discovered, enclosed is the material responsive to Interrogatory No. 2., that is, a list of proposed staff promotions within the Office of Nuclear Energy. Should

there be any questions, please do contact undersigned counsel.

Very truly,

/s/ Tarra DeShields
Tarra DeShields
Assistant United States Attorney

Enclosure
File

## NE-10 Proposed Staff Promotions

| Name | Current Grade | Proposed Grade |
|---|---|---|
| Xavier Davis | GS-8 | GS-9 |
| Susan Harlow | GS-14 | GS-14/15<br>Budget Team Leader |
| Peggy Coates | GS-14 | GS 14/15<br>Personnel Team Leader |

Document # 61423

Date: 3/29/99 2:26 PM
Sender: BEVERLY COOK
To: JOSEPH BARTELL; PEGGY COATES; ROBERT KNIPP; WILLIAM MAGWOOD
cc: JOHN HERCZEG
Priority: Normal
Subject: Re: Recommended Promotions/Career Development Programs

---

Attached is the recommendation of NE-20. However, only Lyn Alperstein falls into the category of someone who is now doing other tasks in her job that would qualify her for a promotion. The others are all career development issues.

Therefore, I recommend Lyn for a promotion, and we will put together career development programs that will address the needs of the remaining employees. Bev

---Reply Separator---

Subject: Recommended Promotions/Career Development Programs
Author: JOSEPH BARTELL
Date: 3/2/99 1:52 PM

As you requested, the subject recommendations are provided in the attachment. The recommendations have been reviewed with and concurred in by John Herczeg. Please advise your comments.

2/19/99

NE-40 - Staff Promotions

Brief History:

| Name | Date of Last Promotion | Promote To |
|---|---|---|
| **1999 Promotions** | | |
| Wade Carroll | Promoted to GS-15 7/31/88 | Senior Level |
| John Warren* | Hired as GS-14 2/15/87 | GS-15 |
| Kevin Shaw* | Promoted to GS-14 6/30/91 | GS-15 |
| Dan Funk | Came to NE as a GS-14 1/24/93 | GS-15 |
| Sue Lesica | Promoted to GS-12 2/15/98 | GS-13/14 |
| **2000 Promotions** | | |
| Homi Amirmokri | Hired as a GS-14 7/28/91 | GS-15 |
| Scott Harlow | Promoted to GS-14 5/12/96 | GS-15 |
| Barbara Cramer | Promoted to GS-9 7/9/95 | other series |
| Julie Simmons | Promoted to GS-8 12/10/95 | GS-9 |
| Yvonne Hebron | Promoted to GS-7 1/23/94 | GS-8 |

**1999 Planned Promotions**

Would like to establish a Senior Level position in Facilities for **Wade Carroll**. Once the Uranium Programs function has been established as a separate office, Wade's current job as the Facilities Deputy Associate Director (a supervisory position) will no longer exist. It is my plan to have Wade serve as the Executive Director, and I feel that this warrants a Senior Level slot.

(**NOTE**: With respect to Senior Level positions, Carl Klee (currently occupying a Senior Level position in EH) has expressed an interest in working in the new Office of Depleted Uranium Hexafluoride Management. Carl worked in NE previously, he would bring to NE a wealth of expertise that would prove to be a real asset. I recommend we considering establishing a Senior Level position for him.)

**John Warren and Kevin Shaw** are scheduled to be transferred to the new Office of Depleted Uranium Hexafluoride Management - it is anticipated that they will be performing more complex and demanding functions that will justify promotions at the GS-15 level. I would allow the new Associate Director of Uranium Programs follow through on these promotions.

**Dan Funk** - has done an excellent job in the electrometallurgical program, and has increased his responsibilities by assuming many of the functions of the Cloin Robertson vacated GS-15 position.

**Sue Lesica** recently joined us and is very involved in the electrometallurgical treatment technology program under development at ANL. Sue recently received her Masters in materials engineering and is proving to be an asset to NE-40. We would like to establish a career path for Susan for a GS-13/14.

**2000 Planned Promotions**

**Homi Amirmokri** - Homi is functioning as the HFIR program manager, detailed to a GS-15 position. He is working well with the field.

**Scott Harlow** will be a part of the new Office of Uranium Programs. Scott is proving to be a dedicated, hardworking individual and an asset to the Office. It is recommended that he be considered for a promotion to a GS-15 in 2000. It is my intention to move Scott to another position within Facilities to broaden his experience base.

NE-40 would like to establish a new function for **Barbara Cramer** that would move her out of the secretarial series. It is hoped to establish a position in the program analyst series, perhaps at the GS-9/11 career path level. It is understood that Barbara would have to be detailed to a set of duties to gain experience/time to qualify for a new series.

With the creation of the Office of Uranium Programs, a slot for a GS-9 secretary will become available. It is my understanding that this will be recruited within NE, and I would encourage **Julie Simmons** to apply for this position.

**Yvonne Hebron** - if Julie were to be selected for the above stated position, I would encourage Yvonne to apply for the GS-8 position vacated by Julie.

Document #59252

2/26/99

NE-50 - Staff Promotions

Brief Summary:

| Name | Date of Last Promotion | Promote To |
|---|---|---|
| **1999 Promotions** | | |
| Earl Wahlquist | Promoted to GS-15 | Senior Level |
| Lisa Herrera | Promoted to GS-14 1997 | GS-15 |
| Jack Wheeler | Promoted to GS-14 1997 | GS-15 |
| **2000 Promotions** | | |
| Myrtle Hicks | Promoted to GS-9 9/9/95 | GS-11 |
| Lloyd Edgerly | Hired as GS-14 1991 | GS-15 |
| Art Mehner | Promoted to GS-15 | Senior Level |

**1999 Planned Promotions**

If NE is to consider senior level positions, then I have included myself as the Associate Director of the office.

Lisa Herrera is serving as the Program Manager for the Advanced Radioisotope Power System Program (ARPS) that the Department is developing for NASA. The position warrants a GS-15 grade level. As program manager, she is directing a $75 million dollar program that is using a very advanced technology. She interfaces with senior personnel in several contractors, laboratories, and other government agencies. In previous programs such as Cassini, the program manager position was a GS-15. Lisa is doing a very good job as the program manager.

Jack Wheeler is responsible for directing and fostering the evolving DOE program planning efforts in support of a potential major national mission to initiate a program for human exploration of the planet Mars. The NASA reference planning mission is based on space reactors and would require major DOE program efforts. The planning efforts require extensive interfaces with senior NASA officials and DOE laboratory personnel. Jack is extremely effective in these interfaces and does an outstanding job on all assignments.

**2000 Planned Promotions**

Myrtle Hicks (Smo) will be in trial period over the next six months with respect to expanded duties relating to her position as a Program Assistant. As part of our reduction in the support service area, she is assuming additional responsibilities with respect to preparing and planning presentations and in providing direct support to the program managers. She will also be taking some specialized training courses over the next few months to enhance her capabilities. If she rises to the challenge, I would propose to upgrade her position to a GS-11 early in FY 2000.

Lloyd Edgerly is the program manager for our national security programs. A new program is scheduled to begin later this fiscal year. It will be a major development and fabrication effort and warrants a GS-15 as the program manager. Lloyd gets very little visibility because of the nature of his programs; but in his own unique way, he does a very good job and we have not had significant problems in his programs.

If NE is to consider broad application of senior level positions, then I would recommend that Art Mehner be considered for a senior level position. Art is really a critical part of the overall management of the radioisotope power

system programs. Without him or someone of equal talent, the programs would have a much harder time to meet their program goals and schedules.

**General Comment**

Though it is desired by most of the senior office secretaries, I just raise a note of caution in moving them all out of the secretarial area. Unless we change the whole way that NE functions, there will still be a need for senior secretaries and it may mean hiring replacement secretaries rather than being able to use the few new positions we receive on hiring young professional interns.

Document #59252v2

3/4/99

NE-70 - Staff Promotions

Brief Summary:

| Name | Date of Last Promotion | Promote To |
|---|---|---|
| **1999 Promotions** | | |
| John Carty | Hired as GS-15 XX/XX/XX | Senior Level |
| John Pantaleo | Promoted to GS-15 XX/XX/XX | Senior Level |
| **2000 Promotions** | | |
| Won Yoon | Promoted to GS-13 XX/XX/XX | GS-14 |
| Chris Karis | Promoted to GS-14 XX/XX/XX | GS-15 |
| Frances Dix | Promoted to GS-9 XX/XX/XX | GS-111/13 |

**1999 Planned Promotions**

If NE is to consider senior level positions, then John Carty and John Pantaleo, who have been GS-15 for a considerable time, should be considered. Both are contributing very substantially to Isotope Programs and career advancements in their current assignments are recommended.

**2000 Planned Promotions**

Won Yoon is currently assigned to the molybdenum-99 and beam spur projects. The molybdenum-99 project will end in 1999; the beam spur will be completed in 2000. Won will finish a degree in computer engineering in May. He is very

interested in maintaining his skills, and to do so must ultimately be active in computer applications at work. If NE pursues a supercomputing project, Won should be considered for reassignment once his current assignments for Isotope Programs are completed. If such a position is not available in NE, an assignment outside of NE will be in order. He is fully capable of performing grade 14 work.

Chris Karis has done excellent work for Isotope Programs, but lacks the technical background to advance to a full customer service representative. He is also very interested in working the Congressional interface. I recommend that Chris be temporarily assigned to the Hill either via detail or through the Brookings program. Once he completes such an assignment, he should be considered for promotion to a GS-15 Congressional liaison position.

Frances Dix has served Isotope Programs as senior secretary and first line customer contact for several years. She is capable of assisting the Marketing Manager in customer contact and outreach activities and should be advanced to a GS 11/13 administrative assistant career ladder after she has completed a basic marketing education program.

**U.S. Department of Justice**

*United States Attorney*
*District of Maryland*
*Northern Division*

*Thomas M. DiBiagio*
*United States Attorney*

*Tarra DeShields*
*Assistant United States Attorney*
*Via Facsimile*

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May 17, 2004

David M. Wachtel
Rose & Rose
1320 19th Street, N.W.
Suite 601
Washington, D.C. 20036

Re: *Amirmokri v. Abraham,*
Civ. No. AW-02-3446

Dear Mr. Wachtel:

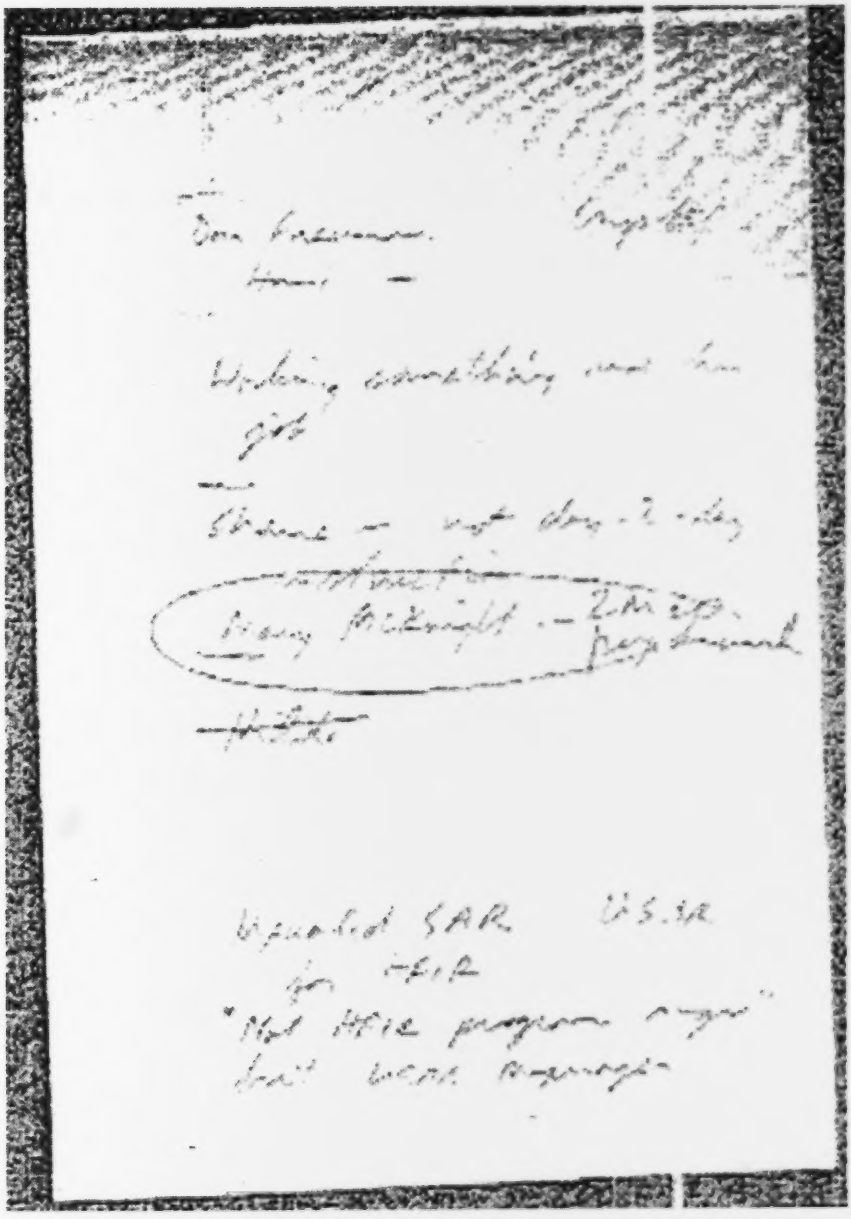
Respecting the above-captioned case, enclosed are notes disclosed to me on May 17, 2004 by John Stamos. The notes were recorded by him and correspond to the subject covered by you during Mr. Stamos's April 23, 2003 deposition, that is, the substance of his contact with Union representatives in the late Summer of 2000. You may

already have a copy of the enclosed notes but such is forwarded to you in any event out of a surfeit of caution. Should there be any questions, please do contact undersigned counsel.

Very truly,

/s/ Tarra DeShields
Tarra DeShields
Assistant United States Attorney

Enclosure
File



Site

- Feedback from the presentation — [illegible] was not good - told verbally [illegible] - last name

- Training plan
  Difficulty in presenting communicating
  & the deficiencies [illegible]
  - Not a check list

- Clearly describe the differences between his work & ~~yours~~ - Let him know what he should not be doing
  [illegible] - on face
  [illegible]

August 14, 2000

Morning:
John Dowicki stopped by to tell me that Don Freeburn, SC, who has been working closely with Homi Amirmokri, would like to talk to see if there is a way to move forward on the situation. Don then called me and we set up a meeting for 3:00 today. It had been reported to John (probably Homi's version) that Homi is doing the work of the program manager as shown by a recent example-There was a report that had a place needing the signature of the HFIR program manager. The line had Homi's name on it, so NE-40 whited-out his name, did not put another in its place, but gave the responsibility to Homi to do the work anyway. John said that this was proof that Homi was "effectively" the program manager.

Wade Carroll
I asked Wade Carroll about Dowicki's view on this situation. Wade explained the background about the report: It was a USAR report that Homi prepared, as assistant, but put his name on with the title of program manager for HFIR. NE-40 told him to take that title off-that he could be the assistant, or the program manager for the USAR.

Afternoon:
Don Freeburn stopped by. Homi's position, as relayed by Don, is that he is doing the large majority of the work managing HFIR, so he should get the title of Program Manager. If Matt Huttmaker is the program manager, it is not obvious what he is doing. I explained that the difference between a program manager and an assistant, is probably mostly a matter of decision making authority. While it may have happened that Matt let Homi take on a greater responsibility than was warranted for the assistant, Matt and Lange were told that Homi is the assistant and he should not be given responsibility beyond that position. We

also discussed the presentation that Homi did for Bill Magwood. I explained that this was not an extra wicket for Homi before he was considered for promotion to program manager, but rather an opportunity to allay some of the concerns that the front office had regarding whether he was ready for the promotion. When the presentation did not go well, Bill's opinion that Homi was not ready for promotion to program manager was not changed. Don asked for us to do three things: First make sure that Homi has been given feedback on the presentation and told what his deficiencies are both in giving presentations and in being the program manager; work with him to develop a training plan/schedule to work on the deficiencies; and fully explain the differences between the duties and responsibilities of the program manager and the assistant program manager.

Alison Taylor
Alison asked that NE do the same three things for which the union has asked, emphasizing the need to point out to Homi the weaknesses in his performance. If leadership or communications are areas where Homi is lacking, then proper training should be offered.

August 15, 2000
I passed on the comments of Dowicki, Freeburn and Taylor to Lange. Bob agreed- He mentioned that he has been working with personnel to tighten up the PDs and has given Homi 4 activities that would normally be done by the program manager to Homi at his request. This was done so that Homi could start the process of growing into the position of program manager, but these activities, while previously being done by the manager, are not precluded from being done by the assistant. The same difference remains-the assistant lacks the same degree of independent approval authority that is reserved to the program manager.

Aug 17

Following an phone call with Lange earlier in the week discussing the three requests of the union (1-counsel HA on how poorly he had delivered his presentation and any other deficiencies that show he is not yet qualified to be the pm; 2-develop a training plan; and 3- clearly describe the differences between the pm and the assistant) and the concurrence in these of Alison Taylor, Zombro and I met with Lange to determine what actions regarding HA had already been taken and which remained so that I could get back to Don Freeburg. Lange stated that HA had been given feedback on his presentation right after it had been delivered to Magwood and Marcus. Lange also set down other deficiencies of HA in a memo that never got finalized in time for a hard copy to be delivered during mid-year reviews. However, lacking the final memo, Lange verbally discussed the issues with HA. A training plan has been developed and will be provided to HA. This plan is not a checklist--it is necessary but not sufficient. HA has also had discussions with SC, who Lange reports are pleased with HA's efforts

As far as activities that HA had been performing, Lange felt he is doing these well. He has not taken any actions away from HA, but recognizes that four of these actions were not were not in HA's pd, so these actions were added. When the Pd is updated, the specific differences between the PM and the assistant can be discussed.

8/00

Don,

After our meeting last week, I spoke with Bob Lange and Wade Carroll, NE-40 management. The following are the actions that have already been taken or will be completed very soon:

- HA has been counseled regarding his shortcomings on his presentation on the HFIR. He has been advised to participate in training to be introduced to the concepts that could improve his presentation skills.

- Ha's pd has been updated to reflect activities that he has been conducting that were not specifically listed. When the PD is final, Lange will discuss with HA the differences between the pm and the assistant and that these activities added do not make his job the pm. Rather, the primary difference between the two positions is the level of independent authority to approve actions.

- A training plan has been developed and delivered to HA. He, with the help of his team leader and supervisor, should develop an IDP to reflect the training plan. It is recognized (as stated on the plan) that completion of the training plan is necessary, but not sufficient, for HA before he would be considered qualified to be the program manager.

Overall, this situation appears to come down to a disagreement between HA and management on when he should be given the full authority and title of Program Manager for the HFIR. Although HA feels he already has all the responsibility of the program manager, his team leader, Matt Huttmaker is, in fact, the program manager.

He alone bears the authority at that level for HFIR. As we discussed earlier, it is the delegation of authority that is the primary difference between the program manager and the assistant. the fact is that he is still the work he now and is performing the duties of the Program Manager. HA's activities associated with HFIR are actions that can be completed by the assistant with the proper level of supervision, regardless that HA categorizes them as full program manager actions. While management fully expects that with time and the acquisition of additional skills, HA will become qualified to be the program manager, it is believed that HA still needs to continue to gain experience at the assistant level.

May 18, 2004

*By Telecopier*

Tarra DeShields
Assistant U.S. Attorney
6625 United States Courthouse
101 West Lombard Street
Baltimore, Maryland 21201-2692

Re: *Amirmokri v. Abraham (DOE)*
AW-02-3446

Dear Ms. DeShields:

Thank you for providing me with a copy of the notes of Mr. Stamos. It appears to me that the notes were responsive to the seven discovery requests listed on the attached page, but were not produced until yesterday. We will object to use of these notes at trial on that basis.

Thank you.

Sincerely,

David M. Wachtel
Attorney for Plaintiff
Homi Amirmokri

cc: H. Amirmokri

## INTERROGATORIES

5. Identify each and every complaint or comment by an NE employee or manager regarding Complainant's personality, interpersonal skills, and management style.

8. Identify all documents containing facts or discoverable information about the matters set forth in the plaintiff's complaint, or in defendant's answer thereto. Separately for each document identified, specifically identify and describe in detail all discoverable information contained in the document.

9. Identify each and every document upon which you intend to rely in support of your position and/or defenses in this case, and state what you believe each document may prove.

## DOCUMENT REQUESTS

4. All documents concerning grooming for promotion of any GS-14 employee of DOE in NE, including, but not limited to, Plaintiff. This request includes, but is not limited to all documents similar to or related to the "Development Plan for Homi Amirmokri" dated August 18, 2000 and the "Technical Direction and Guidance for Homi Amirmokri" dated September 7, 2000. The phrase "grooming for promotion" in this document request has the same meaning as the identical phrase in the affidavit of William Magwood in the report of investigation of DOE Case #00(19)HQ/NE.

5. All documents related to the creation of GS-15 position vacancies in NE, from January 1, 1995 to the present, including, but not limited to personnel action requests, vacancy announcements, and documents related to the decision to advertise a position, including budget documents.

6. All documents related to Plaintiff's presentation of March 24, 2000, including but not limited to, notes taken by other participants in the meeting.

15. All documents discussing or referring to the Plaintiff's concerns regarding performance plans, work assignments, work hours, and promotions, including, but not limited to documents related to the EEO complaint raising these issues.